

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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BELINDA SAAVEDRA, ADRIANNA
SAAVEDRA, ANTHONY SAAVEDRA,
EMMANUEL DOZIER, DAMIAN DOZIER,

Plaintiffs,

vs.

LAS VEGAS METROPOLITAN POLICE
DEPARTMENT, a political subdivision of the
state of NEVADA; Police Chief RICHARD
PERKINS; Acting Sheriff DOUGLAS C.
GILLESPIE; Metro SWAT Sgt. JAMES
CAUSEY; Police Officers SEAN MALIA,
CHUCK COLLINGWOOD, JOE EMERY,
PAT LEDBETTER, MARK LINEBARGER,
RICHARD GAY, MARK FOWLER, BOB
MONTES, BRIAN PETERSON, PAUL COBB,
and DOUG ERICSSON,

Defendants.

Case No.: 2:11-cv-00613-RLH-GWF

ORDER

(Motion to Dismiss—#35)

Before the Court is Defendants Douglas Gillespie, Sgt. James Causey, Chuck Collingwood, Joe Emery, Pat Ledbetter, Mark Linebarger, Rich Gay, Bob Montes, Brian Peterson, Doug Ericsson, and Sean Malia's **Motion to Dismiss** (#35, filed Dec. 15, 2011) based on Rule 12(c) of the Federal Rules of Civil Procedure. The Court has also considered Plaintiffs Belinda

1 Saavedra, Adrianna Saavedra, Anthony Saavedra, and Damian Dozier's Opposition (#36, filed
2 Jan. 3, 2012), and Defendants' Reply (#37, filed Jan. 19).

3 **BACKGROUND**

4 This is a § 1983 case brought against several Las Vegas Metropolitan Police
5 Department ("Metro") officers for excessive use of force during the course of an arrest. Plaintiffs
6 assert the following allegations in support of their case. On December 28, 2008, Defendant
7 Causey received a request to execute a search warrant at Plaintiff Emmanuel Dozier's ("Dozier")
8 home in Henderson, Nevada. The warrant was based on three undercover drug sales which had
9 previously occurred at the home. At around 9:30 P.M., Causey and a SWAT team surrounded the
10 home to execute the warrant. Plaintiff Emmanuel Dozier was inside the home with Plaintiff
11 Belinda Saavedra ("Saavedra") and her two children, Adrianna Saavedra and Damian Dozier. At
12 some point, Saavedra awakened Dozier to tell him that someone was trying to break into the home.
13 Dozier told Saavedra to take the two children to a nearby closet and call the police, and then
14 Dozier went to get his gun. Soon thereafter Dozier began firing his gun at the officers, allegedly
15 believing they were intruders.

16 Meanwhile, Saavedra called the police and was told by the dispatcher that it was
17 law enforcement that was trying to enter the home. Saavedra then informed Dozier of that fact and
18 eventually law enforcement instructed them to exit the home. After exiting the home, Dozier was
19 dragged away by some of the officers, who allegedly also shoved and kicked him. Saavedra and
20 her daughter Adrianna were also shoved and pulled by the hair, and Saavedra was kned in the
21 back while holding her infant son Damian. Anthony Saavedra, also one of Saavedra's children,
22 arrived shortly thereafter and was taken into protective custody along with Adrianna and Damian.

23 In December 2010, Plaintiffs sued Defendants in Nevada state court and in April
24 2011 the case was removed to this Court. Plaintiffs assert the following causes of action: (1)
25 Fourth Amendment search and seizure, Fourteenth Amendment loss of physical property; (2)
26 assault and battery; (3) false arrest and false imprisonment; (4) malicious prosecution; (5) civil

1 conspiracy; (6) intentional infliction of emotional distress; (7) respondeat superior; and
 2 (8) negligence. Defendants have now filed a motion for judgment on the pleadings (though they
 3 style their motion as a motion to dismiss). For the reasons discussed below, the Court grants the
 4 motion in part and denies it in part.

5 DISCUSSION

6 I. Legal Standard

7 A motion made under Rule 12(b)(6) “must be made before pleading if a responsive
 8 pleading is allowed.” Once pleadings are closed, “a party may move for judgment on the
 9 pleadings” under Rule 12(c). However, the legal standard for either motion is virtually the
 10 same—the complaint must contain sufficient factual matter to “state a claim to relief that is
 11 plausible on its face.” *Iqbal*, 129 S. Ct. at 1949 (internal citation omitted); *Fetrow-Fix v. Harrah’s*
 12 *Entertainment, Inc.*, 2010 WL 4774255, *3 (D. Nev. 2010)). The only difference between the two
 13 is that a “Rule 12(c) motion, unlike a Rule 12(b)(6) motion, implicates the pleadings as a whole,”
 14 and not merely the complaint. *Aponte-Torres v. Univ. of P.R.*, 445 F.3d 50, 54-55 (1st Cir. 2006)
 15 (citing 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1368 (3d ed.
 16 2004)). Because Defendants have already filed their answers, they have filed this motion under
 17 Rule 12(c).

18 II. Analysis

19 A. Fourteenth Amendment

20 Plaintiffs’ first claim for relief alleges a violation of rights secured by the Fourth
 21 and Fourteenth Amendments to the U.S. Constitution, namely, the rights to be free from an
 22 unreasonable search and seizure, and “loss of physical liberty.” It is not clear whether Plaintiffs’
 23 reference to the Fourteenth Amendment is a mere formality recognizing incorporation of the
 24 Fourth Amendment against the states through the Fourteenth Amendment, or if it is an entirely
 25 separate claim. The fact that Plaintiffs allege “loss of physical liberty,” however, leads the Court
 26 to believe the reference to the Fourteenth Amendment is an entirely separate claim. To the extent

1 it is an entirely separate claim it is dismissed because Fourteenth Amendment excessive force
 2 claims only apply to pre-trial detainees, *Bell v. Wolfish*, 441 U.S. 520, 535 (1979), and Plaintiffs
 3 were not pre-trial detainees at the time of the alleged constitutional violations. Rather, the alleged
 4 constitutional violations occurred during the course of an arrest, and “all claims that law
 5 enforcement officers have used excessive force . . . in the course of an arrest, investigatory stop, or
 6 other ‘seizure’ . . . should be analyzed under the Fourth Amendment.” *Graham v. Connor*, 490
 7 U.S. 386, 394 (1989). Thus, again, to the extent Plaintiffs assert a Fourteenth Amendment claim it
 8 is dismissed as their factual allegations fall within the contours of the Fourth Amendment. On the
 9 other hand, if Plaintiffs’ reference to the Fourteenth Amendment is a mere formality then the
 10 motion is denied as moot because the Defendants are not contesting, at least at this point in the
 11 litigation, either the reference to the Fourteenth Amendment or the underlying Fourth Amendment
 12 claims. Regardless, the practical effect is the same in that no independent Fourteenth Amendment
 13 claim proceeds.

14 **B. Battery and Assault**

15 “To establish an assault claim, a plaintiff must show that the actor (1) intended to
 16 cause harmful or offensive physical contact, and (2) the victim was put in apprehension of such
 17 contact. To establish a battery claim, a plaintiff must show that the actor (1) intended to cause
 18 harmful or offensive contact, and (2) such contact did occur. *Burns v. Mayer*, 175 F. Supp. 2d
 19 1259, 1269 (D. Nev. 2001) (citing *Restatement (Second) of Torts* §§ 13, 18, 21). Defendants only
 20 challenge Plaintiffs’ assault and battery claims as they relate to Damien Dozier, Saavedra’s infant
 21 son. Plaintiffs allege that Saavedra was kneed in the back while she was holding Damien, and that
 22 Defendants intended to use physical force against Damien. The Court finds this allegation is
 23 sufficient to survive a motion to dismiss. A reasonable person could conclude that kneeling a
 24 person in the back while the person was holding an infant is intent to cause harmful or offensive
 25 contact to the infant. Therefore, the Court denies Defendants’ motion as to this claim.

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1 **C. False Arrest and False Imprisonment**

2 The Court dismisses Plaintiffs’ false arrest/false imprisonment claim. “A police
3 officer is not liable for false arrest or imprisonment when he acts pursuant to a warrant that is valid
4 on its face.” *Nelson v. City of Las Vegas*, 665 P.2d 1141, 1143–44 (Nev. 1983). Therefore,
5 because Plaintiffs do not allege that the warrant executed by the Defendants was facially invalid,
6 they fail to state a claim for false arrest or false imprisonment.

7 **D. Malicious Prosecution**

8 The Court also dismisses Plaintiffs’ malicious prosecution claim. Plaintiffs assert
9 their malicious prosecution claim against various Metro officers. Plaintiffs allege that the officers
10 were responsible for Saavedra’s children being removed from her custody and for the subsequent
11 abuse and neglect charge filed against her. However, a malicious prosecution claim against a
12 police officer has been described by one Supreme Court Justice as “anomalous,” because
13 prosecutors—not police officers—prosecute criminal actions. *Albright v. Oliver*, 114 S. Ct. 807,
14 816 n. 5 (1994) (Ginsburg, J., concurring). And there is no allegation in Plaintiffs’ complaint that
15 the Defendant officers pressured, or attempted to influence, the prosecutors into prosecuting
16 Saavedra or Dozier. Therefore, the Court dismisses this claim.

17 **E. Civil Conspiracy**

18 Plaintiffs’ assert their civil conspiracy claim against various Metro officers.
19 Plaintiffs allege that the officers conspired with each other to violate their rights. Nowhere in the
20 complaint do the Plaintiffs name a prosecutor from the Clark County District Attorney’s Office as
21 a Defendant. Yet, Plaintiffs argue in their opposition to this motion that the officers conspired
22 with certain unnamed prosecutors to both deprive Saavedra of her children and to maliciously
23 prosecute her for abuse and neglect. The Court refuses to allow Plaintiffs to change the
24 substantive allegations in their pleadings. Furthermore, the Court dismisses Plaintiffs civil
25 conspiracy claim as it is plead because the officers are all of the same governmental
26 entity—Metro—and an entity is incapable of conspiring with itself. *Laxalt v. McClatchy*, 622 F.

1 Supp. 737, 745–46 (D. Nev. 1985). Therefore, the Court dismisses this claim. The Court also
 2 refuses to grant leave to amend the Complaint in this order. If Plaintiffs desire to amend their
 3 complaint they can file a separate motion to that effect.

4 **F. Intentional Infliction of Emotional Distress**

5 The Court dismisses Plaintiffs intentional infliction of emotional distress claim
 6 because they fail to allege that they have suffered severe or extreme emotional distress. *Star v.*
 7 *Rabello*, 625 P.2d 90, 91–92 (Nev. 1981).

8 **G. Negligence**

9 The Court dismisses Plaintiffs’ negligence claim because they fail to assert a proper
 10 duty of care. The duty of government, such as police officers, runs to all citizens. *Bruttomesso v.*
 11 *Las Vegas Metro. Police Dep’t*, 591 P.2d 254, 255 (Nev. 1979). Thus, unless Plaintiffs allege
 12 some special relationship or duty particular to them—which they fail to do—the Defendant
 13 officers cannot be liable for negligence for their alleged misconduct. *Id.* Accordingly, the Court
 14 dismisses this claim.

15 **H. Respondeat Superior**

16 The Court dismisses Plaintiffs’ seventh claim for relief of respondeat superior
 17 because respondeat superior is not a cause of action, it is a method of imputing liability on one
 18 person (usually an employer) for the conduct of another (usually an employee).

19 **I. Discretionary Immunity**

20 The Defendants are only entitled to discretionary immunity if they meet two
 21 criteria: (1) their alleged misconduct must involve an element of choice or judgment, and (2) that
 22 judgment is based on consideration of social, economic, or political policy. *Butler ex rel Biller v.*
 23 *Bayer*, 168 P.3d 1055, 1066 (Nev. 2007). Here, Plaintiffs do not contest that Defendants’ alleged
 24 misconduct involved an element of choice or judgment. However, Plaintiffs argue, and the Court
 25 agrees, that Defendants’ exercise of judgment was not grounded in public policy. They were not

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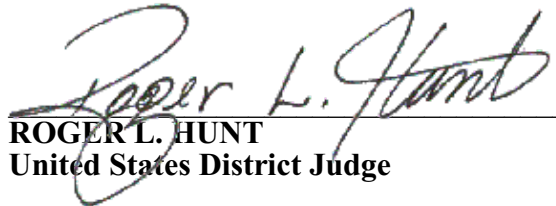
1 engaging in policy-making decisions. They were simply deciding how to properly and effectively
2 execute a warrant. Therefore, the Court finds that discretionary immunity is not applicable.

3 **CONCLUSION**

4 Accordingly, and for good cause appearing,

5 IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (#35) is
6 GRANTED in part and DENIED in part. The Court dismisses the following claims: Plaintiffs'
7 first claim for relief, to the extent it includes a separate claim under the Fourteenth Amendment;
8 false arrest and false imprisonment; civil conspiracy; intentional infliction of emotional distress;
9 negligence; and respondeat superior. All other claims remain.

10 Dated: March 26, 2012

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13 **ROGER L. HUNT**
14 **United States District Judge**
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